

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF ELIJAH D.

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IN RE INTEREST OF ELIJAH D., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT,

V.

REBEKAH F., APPELLANT AND CROSS-APPELLEE.

Filed June 5, 2012. No. A-11-884.

Appeal from the Separate Juvenile Court of Sarpy County: LAWRENCE D. GENDLER,
Judge. Affirmed as modified.

Lisa C. Lewis, of Marks, Clare & Richards, L.L.C., for appellant.

Sandra K. Markley, Deputy Sarpy County Attorney, and Elizabeth Gregory, Senior
Certified Law Student, for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

The juvenile court entered an order terminating Rebekah F.'s parental rights to her son, Elijah D. In the order, the juvenile court found that termination of Rebekah's parental rights was warranted pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 2008) and that termination was in Elijah's best interests. Rebekah appeals and the State cross-appeals from the juvenile court's order. On appeal, Rebekah challenges the statutory grounds for termination of her parental rights and the juvenile court's finding that termination of her parental rights is in Elijah's best interests. On cross-appeal, the State asserts that the juvenile court erred in finding that termination of Rebekah's parental rights was not warranted pursuant to § 43-292(7) and in finding that the State failed to prove that Rebekah was an unfit parent.

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Rebekah's parental rights. However, we also find that the juvenile court erred in determining that termination of Rebekah's parental rights was not warranted pursuant to § 43-292(7) and in determining that the State failed to prove that Rebekah was an unfit parent. As such, we affirm, as modified, the order of the juvenile court terminating Rebekah's parental rights to her son, Elijah.

II. BACKGROUND

This appeal focuses on Rebekah's ability to parent her son, Elijah, born in July 2004. In October 2008, Elijah was removed from Rebekah's care after she left Elijah at a hospital in Papillion, Nebraska. Rebekah left without providing hospital personnel any contact information for her and after she had been told to wait at the hospital. Rebekah later explained that she left Elijah because there was a warrant for her arrest and that she wanted to avoid being arrested in front of Elijah. At the time of Elijah's removal, he was residing with a relative after Rebekah voluntarily decided that she was unable to adequately provide for him.

On November 6, 2008, the juvenile court entered an order placing Elijah in the immediate custody of the Department of Health and Human Services (the Department) and indicated that placement of Elijah was not to include Rebekah's home. Elijah has remained in an out-of-home placement since the entry of that order.

On January 8, 2009, the State filed an amended petition with the juvenile court, alleging that Elijah was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The petition alleged that Rebekah is a convicted felon and that she has a history of drug and alcohol abuse, chronic unemployment, and homelessness. In addition, the petition alleged that Rebekah had abandoned Elijah after taking him to the hospital for an examination.

On the same day the amended petition was filed, an adjudication hearing was held. At that hearing, Rebekah admitted to the allegations contained in the amended petition. As a result of her admissions, the juvenile court adjudicated Elijah as a child within the meaning of § 43-247(3)(a).

After the adjudication hearing, further hearings were held in February and April 2009. At these hearings, the juvenile court ordered Rebekah to participate in a rehabilitation plan. As a part of the rehabilitation plan, Rebekah was ordered to maintain suitable housing and employment, abstain from alcohol and controlled substances, submit to random urinalysis testing, complete a chemical dependency evaluation, participate in dual diagnosis intensive outpatient treatment, participate in a parenting program, and participate in visitation with Elijah. Initially, Rebekah was permitted semisupervised visitation with Elijah. However, beginning in approximately April or May, she was permitted to have unsupervised and overnight visitation with Elijah.

A subsequent hearing was held in September 2009. Rebekah did not appear at this hearing, and her counsel indicated that she was unsure of the reason for Rebekah's absence. At the hearing, it was reported that Rebekah had been struggling in the last few months. She had spent time in jail. In addition, she had begun to be inconsistent in her visitation with Elijah and had stopped cooperating with random urinalysis testing. During one visitation session in July

2009, Elijah discovered a knife and a “drug pipe” in Rebekah’s purse. After this visit, Rebekah’s visitation returned to being fully supervised.

Although Rebekah did not appear at the September 2009 hearing, her counsel did submit a letter authored by Rebekah. In the letter, Rebekah indicated that she was in jail. She admitted that she had not been the best parent to Elijah, but asked the court to give her another chance. Rebekah indicated her willingness to attend treatment and to work hard to get Elijah back.

Shortly after the September 2009 hearing, Rebekah was arrested and charged with theft by receiving, a Class IV felony. She pled guilty to the charge on December 7, and in February 2010, she was sentenced to a period of 18 to 48 months’ imprisonment.

On March 2, 2010, the State filed a motion for termination of Rebekah’s parental rights. In the motion, the State alleged that termination of her parental rights was warranted pursuant to § 43-292(6), because reasonable efforts to preserve and reunify the family failed to correct the conditions that led to the determination that Elijah was within the meaning of § 43-247(3)(a), and pursuant to § 43-292(7), because Elijah had been in an out-of-home placement for 15 or more months of the most recent 22 months. In addition, the State alleged that termination of Rebekah’s parental rights was in Elijah’s best interests.

A hearing on the State’s motion for termination of Rebekah’s parental rights was scheduled for September 28, 2010. A few days prior to the scheduled hearing, Rebekah filed a motion to continue. In the motion, she alleged that she was scheduled to be transferred to a work-release program in Lincoln, Nebraska, in October and that she would be released from jail at the end of December. She requested that the termination hearing be continued until after she had a chance to complete her incarceration and treatment and reconnect with Elijah. Rebekah indicated her intention to be a parent for Elijah.

Almost immediately after Rebekah’s motion to continue was filed, the State filed a motion to withdraw its motion to terminate Rebekah’s parental rights. As a result of the State’s motion to withdraw, the case continued to proceed in juvenile court.

A hearing was held in October 2010. At that hearing, Rebekah informed the juvenile court that she had been transferred to the work-release program in Lincoln and that she was employed through that program. She also indicated that she had completed 6 months of inpatient treatment while incarcerated and was currently attending Alcoholics Anonymous/Narcotics Anonymous meetings on a regular basis. She stated that she was set to be released from jail on December 29 and had made arrangements to move to Alliance, Nebraska. Rebekah had a job set up there and had housing waiting for her. The juvenile court indicated that it was not opposed to Rebekah’s plan to move to Alliance. In fact, the court indicated its intention to continue to assist Rebekah in achieving reunification with Elijah. The juvenile court told Rebekah that it was possible that Elijah could be returned to her care in December when she was released from jail and that the proceedings could be transferred to a court in Alliance. The parties did not object to the court’s stated plan. Based upon the plan of reunification, visitation between Rebekah and Elijah was to resume in November 2010.

On December 27, 2010, 2 days before Rebekah’s scheduled release from jail, an incident occurred that ultimately led to Rebekah’s conviction for felony escape. On this date, while Rebekah was waiting for a van to pick her up and take her to work, she was observed hugging her boyfriend, who was also an inmate at the jail. Such contact with another inmate is not

permitted. Rebekah and her boyfriend were “written up” by a corrections officer. As a result of getting written up, Rebekah missed her van and her boyfriend fled the jail’s premises. Then she left the jail’s premises without authorization, following her boyfriend. Ultimately, Rebekah was apprehended in a building after being pursued by helicopters and search dogs. Rebekah was charged with felony escape and pled guilty to that charge. She received an additional 1 to 2 years of incarceration.

On March 22, 2011, the State filed another motion to terminate Rebekah’s parental rights to Elijah. In the motion, the State alleged that termination of her parental rights was warranted pursuant to § 43-292(6) and (7). In addition, the State alleged that termination of Rebekah’s parental rights was in Elijah’s best interests.

In August 2011, a hearing was held on the State’s motion to terminate Rebekah’s parental rights. While we have reviewed the evidence presented at the termination hearing in its entirety, we do not set forth the specifics of the voluminous testimony and exhibits here. Instead, we will set forth more specific facts as presented at the hearing as necessary in our analysis below.

After the termination hearing, the juvenile court entered a detailed order finding that the State proved by clear and convincing evidence that grounds for termination of Rebekah’s parental rights existed under § 43-292(6) and that termination was in Elijah’s best interests. The court terminated Rebekah’s parental rights to Elijah. However, the court dismissed the portions of the State’s motion which alleged that termination of Rebekah’s parental rights was also warranted pursuant to § 43-292(7) and that Rebekah was an unfit parent. The court indicated that the State had failed “to prove that the mother is an unfit parent by clear and convincing evidence.”

Rebekah appeals and the State cross-appeals from the juvenile court’s order.

Pursuant to this court’s authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

III. ASSIGNMENTS OF ERROR

On appeal, Rebekah alleges, restated and consolidated, that the juvenile court erred in (1) finding that the State proved that termination of her parental rights was warranted pursuant to § 43-292(6) and (2) finding that termination was in Elijah’s best interests.

On cross-appeal, the State alleges that the juvenile court erred in (1) finding that termination of Rebekah’s parental rights was not warranted pursuant to § 43-292(7) and (2) finding that the State failed to prove that Rebekah was an unfit parent.

IV. ANALYSIS

1. STANDARD OF REVIEW

An appellate court reviews juvenile cases *de novo* on the record and reaches its conclusions independently of the juvenile court’s findings. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in

the child's best interests. See *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven. *Id.*

2. STATE'S CROSS-APPEAL

We first address the issues raised in the State's cross-appeal. The State asserts that the juvenile court erred in finding that termination of Rebekah's parental rights was not warranted pursuant to § 43-292(7) and in finding that the State failed to prove that Rebekah was an unfit parent. Upon our de novo review of the record, we conclude that the State's assertions have merit.

In its motion to terminate Rebekah's parental rights, the State alleged that termination was warranted pursuant to § 43-292(6) and (7). In explaining the basis for its allegation that termination was warranted pursuant to § 43-292(7), the State indicated:

Said child was placed in protective custody for out-of-home foster care on or about October 30, 2008, and remains in protective custody in out-of-home foster care for a period in excess of fifteen (15) of the most recent 22 months. The mother remains unfit for placement of the minor child in her home.

The juvenile court dismissed this entire allegation, stating that the State had failed "to prove that the mother is an unfit parent by clear and convincing evidence."

(a) § 43-292(7)

The juvenile court erred in failing to find that termination of Rebekah's parental rights was warranted pursuant to § 43-292(7). Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." See, also, *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). The Nebraska Supreme Court has held that § 43-292(7) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of the parent. *In re Interest of Aaron D.*, *supra*. As such, parental fitness is not a factor in finding that termination of a person's parental rights is warranted pursuant to § 43-292(7). Rather, when termination is based upon a finding that § 43-292(7) applies, parental fitness would be addressed in considering the child's best interests. See *In re Interest of Aaron D.*, *supra*. Based on our reading of the juvenile court's order, it appears that the court considered Rebekah's fitness as a parent in determining that § 43-292(7) did not apply.

Despite the juvenile court's finding, there is clear and convincing evidence that termination of Rebekah's parental rights is appropriate pursuant to § 43-292(7). Elijah was removed from Rebekah's care in October 2008 and was never returned to her custody during the pendency of the juvenile court proceedings. As such, when the State filed its motion to terminate Rebekah's parental rights in March 2011, Elijah had been in an out-of-home placement for approximately 28 months, or almost 2½ years. And, at the time of the termination hearing in August 2011, Elijah had been in an out-of-home placement for 34 months, or almost 3 years.

Based on this evidence, there is no dispute that Elijah was in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires.

Because the evidence presented at the termination hearing clearly and convincingly demonstrated that Elijah was in an out-of-home placement for almost 3 years, termination of Rebekah's parental rights is appropriate pursuant to § 43-292(7). The juvenile court erred in finding otherwise. We modify the court's order to reflect that § 43-292(7) supports termination of Rebekah's parental rights.

(b) Parental Fitness

The juvenile court also erred in finding that the State failed to prove that Rebekah was an unfit parent. The Nebraska Supreme Court has previously defined parental unfitness to mean a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990). See, also, *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011). The court has also held that evidence of unfitness should be focused upon a parent's present ability to care for a child and that evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults. *In re Interest of Lakota Z. & Jacob H.*, *supra*.

Before we discuss the evidence concerning Rebekah's fitness as a parent presented at the termination hearing, we are compelled to note the inherent inconsistencies in the juvenile court's order. The court specifically found that the State failed to prove Rebekah was an unfit parent; however, the court went on to terminate her parental rights based on its finding that § 43-292(6) supported termination and its finding that termination was in Elijah's best interests.

A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007). And, although § 43-292 does not expressly use the term "unfitness," that concept is encompassed by the fault and neglect described in subsections (1) through (6), where applicable, and, for all subsections, by a determination of the child's best interests. *In re Interest of Xavier H.*, *supra*.

Based upon the foregoing principles, the juvenile court erred in concluding that termination of Rebekah's parental rights was appropriate, while at the same time finding that there was insufficient evidence to demonstrate her unfitness as a parent. When the court determined that termination of Rebekah's parental rights was warranted pursuant to § 43-292(6) and that termination was in Elijah's best interests, it arguably was making an implicit determination that Rebekah was not presently a fit parent for Elijah.

Moreover, the evidence presented at the termination hearing clearly and convincingly demonstrated that Rebekah is not presently a fit parent for Elijah. Essentially, this evidence reveals that Rebekah has demonstrated a repeated pattern of making progress toward becoming a stable and appropriate parent for Elijah and then markedly regressing by using drugs, engaging in criminal acts, and generally preventing any sort of reunification with Elijah.

We note that upon our de novo review of the record, we consider all of the evidence presented concerning Rebekah's and Elijah's lives since the inception of the juvenile court proceedings in November 2008. To the contrary, the juvenile court indicated that it felt

constrained in what evidence it could consider. Ultimately, it appears the court considered only evidence of events which occurred after the October 2010 hearing where the parties agreed to work toward reunification of Rebekah and Elijah. While it is not entirely clear why the juvenile court felt such constraint, we reiterate that in termination of parental rights cases, the court should consider evidence of the parties' circumstances since the beginning of the case with a particular focus on the amount of progress that has been made toward reunification.

Here, Rebekah's pattern of progress followed by regression is perhaps best highlighted by the events that occurred in December 2010. At this time, Rebekah was days away from being released from jail. She had obtained a job and a home in Alliance, and the juvenile court had indicated its intention to reunite her with Elijah upon her release. Rebekah had also reportedly completed a drug treatment program and had repeatedly expressed her sincere desire to turn her life around and to be a good parent for Elijah. Rebekah then chose to leave the jail's grounds without authorization in order to follow her boyfriend who was, apparently, upset after getting into trouble for hugging Rebekah. Rebekah was charged with escape and received an additional 1 to 2 years of imprisonment. As a result of Rebekah's poor decisionmaking, she has again delayed reunification with Elijah and Elijah has suffered from Rebekah's actions. There was evidence that after Rebekah's escape from jail, Elijah became less invested in the relationship with Rebekah, acted out, and retreated emotionally.

The incident in December 2010 is not the first time that Rebekah has sabotaged her reunification with Elijah. In early 2009, shortly after the juvenile proceedings were initiated, Rebekah was making progress toward becoming an effective parent. In fact, she was awarded unsupervised and overnight visitation with Elijah. Then, in approximately May 2009, Rebekah began to regress. She stopped complying with urinalysis testing, and there was evidence that she was using drugs. She began to be inconsistent in her attendance at visitation. At one visit in July 2009, Elijah began playing with a knife and drug paraphernalia he found in Rebekah's purse. Rebekah's visits then returned to fully supervised. Shortly after this, Rebekah committed theft by receiving, which resulted in her being sentenced to a lengthy prison term. Rebekah's behaviors negatively affected her relationship with Elijah. As a result of her incarceration, she was not able to visit with Elijah for an extended period of time and the State filed its first motion to terminate her parental rights.

Taken together, all of the evidence presented at the termination hearing clearly and convincingly demonstrated that Rebekah is presently an unfit parent for Elijah. She has consistently demonstrated an inability to maintain a stable and appropriate lifestyle which would be conducive to having Elijah back in her care. Instead, she has made repeated bad choices that have resulted in Elijah's languishing in foster care without any permanency in his life.

We conclude that the juvenile court erred in finding that there was insufficient evidence to demonstrate that Rebecca was an unfit parent. Accordingly, we modify the juvenile court's order to reflect our finding that the evidence clearly and convincingly demonstrates that Rebekah is not presently a fit parent for Elijah.

3. REBEKAH'S APPEAL

(a) § 43-292(6)

On appeal, Rebekah argues that the juvenile court erred in finding that termination of her parental rights was warranted pursuant to § 43-292(6). Specifically, she argues that she had made progress toward reunification and that the Department did not make reasonable efforts to assist her.

As we mentioned above, termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 is established. See *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). If an appellate court determines that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. See *In re Interest of Jagger L.*, *supra*.

In the previous section, we found that there was clear and convincing evidence that termination of Rebekah's parental rights was appropriate pursuant to § 43-292(7). In light of this fact, we need not, and do not, address Rebekah's assertions that the juvenile court erred in finding that termination was appropriate pursuant to § 43-292(6).

(b) Best Interests

Rebekah also argues that the juvenile court erred in finding that termination of her parental rights is in Elijah's best interests. Specifically, she argues that the court based its decision to terminate her parental rights solely on her most recent incarceration and that there was insufficient evidence to demonstrate that termination was necessary. Rebekah's assertions have no merit.

As we discussed more thoroughly above, the evidence presented at the termination hearing revealed that Rebekah is not presently a fit parent for Elijah. She has been unable to consistently maintain a stable and appropriate lifestyle that would make it possible for her to parent Elijah. Instead, Rebekah has repeatedly made some very bad decisions that have negatively affected Elijah's well-being and his relationship with Rebekah.

Rebekah is currently incarcerated, and it is unclear from the record exactly when she will be released. This current incarceration came as a result of Rebecca's decision to escape from jail only days before her release and reunification with Elijah. We recognize the longstanding rule that a parent's incarceration, standing alone, does not provide grounds for termination of parental rights. See *In re Interest of Leland B.*, 19 Neb. App. 17, 797 N.W.2d 282 (2011). However, in this case, Rebekah's current incarceration is but one factor to consider in determining whether termination of her parental rights is warranted. And, a parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated. *Id.*

In considering all of the evidence presented as to Rebekah's circumstances since the beginning of these juvenile court proceedings, we find that there are multiple factors weighing in favor of terminating her parental rights. Such factors include Rebekah's decisions to continue to use drugs during the juvenile court proceedings, to commit multiple crimes that have resulted in her being incarcerated for a lengthy period of time, and to place Elijah in harm's way by bringing

a knife and drug paraphernalia to her visitation with him. In addition, there was evidence that Rebekah failed to fully comply with the juvenile court's orders while she was not incarcerated.

Other evidence presented at the hearing revealed that Elijah has special needs that require him to have a consistent and stable home environment. Elijah has behavioral problems that are exacerbated when there is inconsistency and change in his life. Rebekah has demonstrated that she is not capable of providing Elijah with stability. In fact, Rebekah's decision to escape from jail days before her release seriously affected Elijah's therapeutic progress. He regressed both emotionally and behaviorally after finding out that Rebekah was not coming home. Rebekah's relationship with Elijah has also suffered as a result of her escape. Elijah is no longer as excited to see her and has started to ask that visits with Rebekah be terminated earlier than necessary.

It is clear that Rebekah loves Elijah and wants to be a parent to him. However, it is also clear that Rebekah is not ready to be a parent and that even after she is released from jail, she may not be ready for quite some time. Elijah has been out of Rebekah's home for almost 3 years, and he deserves and requires a permanent placement. Accordingly, we find that the State presented clear and convincing evidence to demonstrate that termination of Rebekah's parental rights is in Elijah's best interests.

V. CONCLUSION

Upon our de novo review of the record, we find that the State presented sufficient evidence to warrant termination of Rebekah's parental rights. However, we also find that the juvenile court erred in determining that termination of Rebekah's parental rights was not warranted pursuant to § 43-292(7) and in determining that the State failed to prove that Rebekah was an unfit parent. As such, we affirm, as modified, the order of the juvenile court terminating Rebekah's parental rights to her son, Elijah.

AFFIRMED AS MODIFIED.